

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

EMILY SIMMONS

PLAINTIFF

V.

CIVIL ACTION NO.1:05CV16-GHD-JAD

JIMMY TAYLOR, ET AL

DEFENDANTS

REPORT AND RECOMMENDATION

On October 6, 2005, plaintiff, a pretrial detainee at the Alcorn County jail, appeared before the court for a hearing pursuant to *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985) to determine if there exists a justiciable basis for his claim filed pursuant to 42 U.S.C. §1983.

Simmons has filed a new suit setting forth the same complaints against the defendants in her earlier suit in 1:04CV285-WAP-JAD. In the earlier suit, the defendants have filed for summary judgment and the undersigned has recommended that the motion be granted. As this action is an attempt to repeat the earlier litigation it should be dismissed without prejudice, due to the pendency of the other action. Simmons has been advised at the hearing that she is not allowed to get a second bite at the apple and that it is not proper to file the same lawsuit more than once.

Accordingly it is recommended that this action be dismissed without prejudice.

The parties are referred to 28 U.S.C. 636(b)(1) and Local Rule 72.2(D) for the appropriate procedure in the event any party desires to file objections to these findings and recommendations. Objections are required to be in writing and must be filed within ten days of this date. Failure to file written objections to the proposed finding and recommendations contained in this report within ten days from the date of filing will bar an aggrieved party from challenging on appeal both the proposed

factual findings and the proposed legal conclusions accepted by the district court *Douglass v. United Services Automobile Association*, 79 F.3d 1415 (5th Cir. 1996).

Plaintiff is directed to acknowledge receipt of this report and recommendation by signing the enclosed acknowledgment form and returning it to the court within ten days of this date. Plaintiff is warned that failure to comply with the requirements of this paragraph may lead to the dismissal of this lawsuit under F.R.Civ.P. 41(b) for failure to prosecute and for failure to comply with an order of the court.

This the 7th day of October, 2005.

/s/ JERRY A. DAVIS
UNITED STATES MAGISTRATE JUDGE